No. 3520

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RAINIER BREWING COMPANY, a Corporation
Plaintiff in Error

vs.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation
Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Brief for Defendant in Error

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Brief for Defendant in Error

The present appeal we assume is chiefly for the purpose of obtaining a final judgment upon which a review by the Supreme Court of the United States may be predicated; a previous writ of error having failed because the judgment of this court to which the writ was directed was not a final judgment: *Rainier Brewing Company v. Great Northern Pacific Steamship Company*, 40 S. C. R. 54. The brief now submitted for the Brewing Com-

pany presents no question not already considered and decided upon the Steamship Company's writ of error to the trial court's judgment of dismissal upon the pleadings: *Great Northern Pacific Steamship Company v. Rainier Brewing Company*, 255 Fed. 762.

In this situation we see no occasion for restating the argument previously made to this court. If the court's decision is unsatisfactory to the Brewing Company in that it does not give an explanation of its conclusions, at least it is certain that the contentions of the Brewing Company were fully presented to the court upon the former appeal, and the court was fully aware of the theory of the Brewing Company when a conclusion was reached. On the general aspects of the question involved, we desire, therefore, merely to append an excerpt from our brief filed in support of the former writ of error, stating the argument made at that time for the Steamship Company.

The suggestion made in the brief now filed by the Brewing Company that the American Transfer Company, the named consignee of the two shipments of beer involved, was a transportation facility and therefore permitted to take delivery from the rail carriers does not require an extended answer. If the Transfer Company could qualify as a carrier under the prohibition statutes of Washington, certainly it did not assume that character

as to the shipments of beer in question. It was the named consignee and the effort was to have the rail carriers who were charged with the responsibility of transporting *and delivering* the property, deliver these shipments in bulk to the Transfer Company, passing to it the obligations as to delivery to the permittees which were imposed by the Washington statute.

The Great Northern Pacific Steamship Company and its connections, including the Northern Pacific Railway Company as delivering carrier, were the transportation companies which undertook the responsibility of bringing into the State of Washington certain individual shipments of beer. The Transfer Company in Seattle was not one of the transportation agencies employed to handle these shipments, but its professed relation to the shipments was that of consignee. The carriers, therefore, were faced with the question of whether they could make delivery and end their responsibility by turning over the shipments to the named consignee, or whether the statutory provisions imposed upon the carriers the duty of delivering only to the persons in whose names permits had been issued. Under the statute the Transfer Company could not secure a permit, nor could it take delivery for the permittees; hence the carriers could not do otherwise than handle each shipment separately and make delivery of each to its owner.

The Washington prohibition statute contemplated the use of only one agency as between the seller of liquor outside of the state and the purchaser within the state. The word "deliver" in the statute could mean only delivery by the transportation agency to the person in whose name the permit had been issued. There was no statutory provision for an intermediary such as a transfer or drayage company, acting either for the Brewing Company or the permittees. Transportation companies were permitted to bring in properly labeled shipments and to deliver them upon canceling the permit. The Transfer Company in this case did not sustain to the shipment the relation of a transportation agent. On the contrary, it was the attempted consignee, and obviously the transportation companies could not escape their obligations as to delivery by turning the shipments over to the Transfer Company for further handling.

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ADDENDUM.

ARGUMENT.

The single question in this case is whether or not the Brewing Company's shipments of beer could lawfully have been transported into Washington as carload shipments and delivered by the carriers to a transfer company. If notwithstanding the requirements of the state and federal statutes then effective the beer could have been handled to destination and delivered as planned at the time of shipment, obviously the carriers may not now recover additional charges even though they have performed the additional services consequent upon the handling of the packages in less than carload lots. If, on the contrary, the carriers could lawfully handle the shipments only by assuming responsibility for the transportation and delivery to the individual permittees (the ultimate consignees under the Washington statute) of their respective packages, then there was collectible from these consignees or from the shipper (defendant in error) the tariff charges applicable to the character of transportation furnished.

We may dismiss from consideration at once any suggestion that the carriers by accepting the beer billed as two carload shipments, obligated themselves to carry it in that manner and precluded the assessment of transportation charges on any other basis. *Texas & Pacific Co. v. Mugg*, 202 U. S. 242

(cited and approved in many later cases) settled that an interstate carrier must collect its tariff rates applicable to the transportation furnished, no matter what may have been its expressed undertaking with the shipper. When after the acceptance of the shipments and after their transportation had commenced, it became apparent that the transportation service could be lawfully performed only by assuming responsibility for the individual packages, the obligation to so transport and deliver the beer and to collect the tariff charges for that kind of transportation became impliedly a part of the contract of the parties.

When the rail carriers took the shipments from the Steamship Company and the question of carload or less than carload handling became of importance, the rail carriers were forced to determine in what manner the shipping contract could be performed without violation of law; how the beer could be transported to its destination at Seattle and delivered in conformity with the restrictions imposed upon the carriers by state and federal law. Their conclusion was that the Washington prohibition law and the federal criminal code (Sec. 238, Criminal Code, Section 10408, Compiled Statutes 1916) forbade the transportation in bulk and required them to undertake the duty of transporting and delivering the individual packages making up the two shipments to the persons who under the permits affixed to the packages had been authorized by law

to receive them. If this conclusion is correct, it follows that the charges for the handling of the individual shipments are collectible.

It is clear, too, that notwithstanding the interstate character of the shipments, compliance with the requirements of the state statutes was necessary. Under the Webb-Kenyon law (37 Stats. 699, Sec. 8739, U. S. Comp. Stats. 1916) the carriers could bring this beer into Washington and deliver it only when the requirements of the Washington law had been observed: *State v. Great Northern Railway Co.*, 165 Pac. 1073; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311.

The applicable provisions of the Washington prohibition law are found in Sections 6262-15 to 6262-20, inclusive, Remington's 1915 Codes and Statutes. They provide a plan for the shipment into the state by individuals of a limited quantity of liquor every twenty days. Section 6262-15 provides that "any person" desiring to ship or transport any intoxicating liquor shall personally appear before the county auditor and make a sworn statement showing, among other things, his name, that he is over 21 years of age, and the name and address of the person, firm or corporation from whom the shipment is to be made. Upon this statement the county auditor is authorized to issue a permit to the individual to "ship or transport" the limited quantity of liquor, and the permit so

issued authorizes the permittee to transport the liquor, or if he desires to ship it, authorizes the carrier with which he may make shipping arrangements to handle it for him. The authority given the carrier by this action and by Section 6262-18 is specific. When the applicant gets his permit and affixes it to the package, the carrier may transport it, *providing* it contains not more than one-half gallon of liquor other than beer, or twelve quarts or twenty-four pints of beer. Before completing the transportation and delivering the package of liquor the carrier must cancel the permit and deface it so that it cannot be used again; and it is made unlawful for the carrier to transport or carry any intoxicating liquor except as authorized by the permit, or to carry for any one under the authority of a permit more liquor than the limit provided by statute.

Section 6262-18 prohibits carriers from bringing liquor into the state except in packages having affixed and prominently displayed the permits issued by the county auditor; and forbids the carrier to deliver or the consignee to receive the package unless it has the requisite permit properly attached and cancelled. Section 6262-20 contains the added requirement that the carrier must not transport the liquor within the state unless the package is clearly and plainly marked with the words "This Package Contains Intoxicating Liquor."

Statutes imposing restrictions on carriers in the handling of intoxicating liquors almost universally require more than that they shall knowingly refrain from aiding in law violations. The manifest difficulty of enforcing prohibition laws without active co-operation by the carriers is held to justfy regulations which amount practically to a policing of shipments by the transportation companies: *Commonwealth v. Mixer*, 207 Mass. 141, 93 N. E. 249.

This clearly is the intent of the Washington prohibition statute. In the same section of the law (6262-15) granting to the individual a limited right to bring in intoxicating liquor is found the authority given the carrier to transport the liquor; and under that authority the carrier may transport the liquor covered by the permit and no more. Before completing the transportation and making delivery of the package to the individual entitled to it, the carrier is charged with the duty of cancelling and defacing the permit affixed to the package. The carriers are expressly forbidden (Section 6262-18) to bring any liquor into the state except that permitted by the policing regulations referred to; and it is a violation of the law for a carrier to turn over any of these package shipments to the persons entitled without the cancellation and defacement of the permit.

The effect of these regulations is to require of the carrier active aid not only in keeping out unau-

thorized shipments of liquor, but in preventing the individual from securing more than the amount allowed or from importing it more frequently than is permitted by the statute. The carrier must assume responsibility for the transportation *and delivery* of each and every package of liquor shipped; when the individual exercises the statutory permission to bring in liquor, the carrier who is authorized to transport it for him first must make certain that the permittee has secured the right to ship, and second, must see to the cancellation of his permit before he is allowed to receive his shipment.

The duty thus imposed upon the carriers of policing individual shipments is wholly inconsistent with the right to transport in bulk or carload shipments contended for by the Brewing Company in this case. It asked of the carriers that they take into Washington two carloads of beer (made up, it is true, of individual packages, each with its permit affixed), and to make delivery not of the packages to the individual permittees whose authority to ship contained the carrier's only authority to transport, but of the carloads of beer to a transfer company.

The purpose of the statute was to prevent all importation of liquor except by individuals under special license issued by county auditors, and to forbid all transportation of liquor except that carried for these individuals under the permits secured by them; and the carriers were called on to see that

these individuals did not take delivery of their shipments until certain prerequisites had been complied with. The Transfer Company — the named consignee of the Brewing Company's carload shipments — could not import any liquor. It could not qualify as the permittee to whom, after cancellation of the permit affixed to the package, the carrier was authorized to make delivery. Clearly the framers of the statute intended that the carriers whose right to transport liquor was so carefully limited should be responsible for the packages from the time they entered the state until they were delivered; that is, until they were placed in the possession of the persons entitled by law to receive them and for whom the carrier was allowed to handle them.

The Brewing Company's argument apparently is that the carriers are given blanket authority to bring into Washington for brewing companies' distributing agents, transfer companies and others, bulk shipments of liquor, providing only that the shipments include only packages containing not more than the statutory limit and each bearing a permit cancelled and defaced at some time during transportation; and that the matter of delivery to the permittee may be left to the distributing agent, transfer company or other person or corporation receiving the carload shipments from the carrier.

No such general license to transport liquor is

given the carriers by the Washington prohibition law. The argument of the Brewing Company fails to notice that the only authority given the carriers is in respect of the transportation for the individual of the liquor covered by his permit. The statute (Section 6262-15) in effect says to the individual "you may bring in or have brought in by a carrier a limited quantity of liquor every twenty days," and to the carrier, "you may bring in the liquor and deliver it, after cancelling and defacing the permit to the person so authorized to receive it."

It will be urged that there is nothing in the statute expressly forbidding bulk shipments to a distributing agent— that the prohibition (Section 6262-18) is merely against the transportation of any liquor except that covered by permits, and that the way in which these "permit" shipments are brought in is immaterial. This overlooks the fact that the statute forbids all traffic in and transportation of intoxicating liquor, *except* as authorized by the statute. Section 6262-18 must be read in conjunction with Section 6262-15, which grants the only right given by the law to bring or have transported into the State of Washington any intoxicating liquor. This latter section allows an individual at stated intervals and under carefully stated restrictions either to bring in or arrange with a carrier to ship in a limited quantity; and the transportation thus sanctioned is all that the carrier may undertake.

These "limited quantity" shipments the law says the carrier must not deliver until it has cancelled and defaced the permits; and when the purpose of the statute is kept in mind, it is apparent that the delivery contemplated to be made by the carrier is to the individual who has secured the statutory permission to bring in the liquor. The sections of the statute referred to deal with the right of individuals to import liquor and the right to transport and deliver granted to the carriers pertains to these same individual shipments. The carrier's responsibility is to see that certain regulations are obeyed before it may turn over to the individual his shipment of liquor; and the purpose of the act in placing this obligation upon the carrier makes it certain that its deliveries of liquor can be to no other persons than the individuals upon the strength of whose permits the transportation is undertaken.

While the language of the statute is not specific, its provisions taken as a whole indicate beyond question that carriers were to assume responsibility for the transportation *and delivery* of the shipments in accordance with the restrictions imposed; and the "delivery" referred to must be interpreted as meaning the taking of possession by the individual permittee.

Any other construction of the statute would render it, so far as the transportation restrictions are concerned, wholly ineffective. Transfer companies,

distributing agents and the like are not named in the statute as authorized to handle liquor shipments, nor are any limitations with respect to delivery imposed upon them. If the carrier has no responsibility other than to see to the cancellation of the permit after the transportation has been begun, and if a delivery to the Transfer Company or distributing agent—after the cancellation of the permit—is a full compliance with its duty, supervision of the shipments would end with that delivery and the Transfer Company or distributing agent would be free to dispose of the shipments to the permittees, their assignees, or to any one else claiming to be entitled to possession.

Under this interpretation of the law a liquor dealer outside the state could readily establish within the state a distributing depot or agency in charge of an agent whose activities would only be limited by the number of permits he might be able to secure; and the state would be powerless to check the traffic or take any steps to see that the package shipments reached only the individuals to whom the permits had been issued.

No specific provision of the statute is directed toward such a practice, *because* the only transportation which the carriers are allowed to undertake is of the shipment of the individual securing the permit; and before the carrier can deliver it over and before he can take it, the carrier must cancel

the permit. This limitation upon the right to transport and the requirement with respect to delivery, make it clear that the carrier must handle each package shipment separately as the shipment of the permittee and must assume responsibility for its delivery, with the permit cancelled and defaced, to the permittee.

The policing regulations of the statute, apart from the question of delivery, are inconsistent with the idea of carload or bulk transportation. Carload shipments ordinarily move under seal from the warehouse of the shipper to the industry track of the consignee. The carrier is not concerned with the contents of the cars except in so far as inspection for rate classification may be necessary; and the great disparity between the carload and less than carload transportation charge presupposes no other service in respect of carload shipments than the hauling of a car loaded by the shipper from his industry to the plant of the consignee at destination where the car is unloaded by the consignee.

This limited transportation service is, of course, inapplicable to Washington liquor shipments. Each package of liquor handled is subject to examination by the carrier, since the right of the carrier to transport it is conditioned upon its containing not more than the quantity allowed by law. Each package must be scrutinized by the carrier to make certain that it is conspicuously labeled, and that it has

the statutory permit affixed; and finally the carrier before delivery must cancel and deface the permit on each package.

These requirements argue conclusively that it was intended to place upon the carriers responsibility for the transportation as separate shipments of the individual packages of liquor allowed to be brought in; and to compel retention of that responsibility until the liquor was turned over to the person allowed by law to receive it. Transportation service of that kind could be performed only by handling these shipments of beer as less than carload shipments. Transportation in bulk or carload shipments and delivery to a transfer company or distributing agent was not authorized by anything in the Washington statute, and the practice would be violative of the purposes of the prohibition law.

Section 238 of the Criminal Code of the United States (35 Stats. 1136, Sec. 10408 Comp. Stats. 1916) is as follows:

> "Any officer, agent, or employe of any railroad company, express company, or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind which has been shipped from one state, territory, or district of the United States, or place noncon-

> tiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

Under this statute liquor shipments may not be delivered to any one but the consignees, or to persons presenting written orders from the consignees; and the "consignees" have been defined (*U. S. v. Eighty-seven Barrels, etc., of Wine*, 189 Fed. 215) as meaning those persons or corporations to whom the carrier may lawfully make delivery of the consigned goods.

Applying this statute in conjunction with the Washington statute, there results a positive inhibition against the delivery by the carrier of the individual liquor shipment to any one else than the person named in the permit. Notwithstanding the naming of a transfer company as consignee, the individual permittee was the only one authorized by the Washington law to ship the liquor and to take delivery after the cancellation of the permit. In the language of the decision last cited, he was the one "to whom the carrier might lawfully make delivery of the consigned goods"; and the provision of the Criminal Code referred to made it a federal offense to deliver the liquor to any one else.

When the carriers undertook the transportation of these consignments of beer to Seattle they were apprised by the permits that the individuals there named were the ultimate consignees of the packages included in the shipments. Delivery to the named consignee (the Transfer Company) or to any one else than the permittees individually would have been a violation of state and federal law; and the assumption of responsibility for the individual packages and for their delivery to the different permittees meant the handling of the packages as less than carload shipments.

We submit that the trial court was wrong in disallowing the claim for the less than carload freight charges.

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